

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC JEFFREY BROWN,

Defendant-Appellant.

UNPUBLISHED

May 1, 2012

No. 304018

Kent Circuit Court

LC No. 10-002705-FH

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for operating a motor vehicle while intoxicated, MCL 257.625(1); failure to stop at the scene of property damage or accident, MCL 257.618; and reckless driving, MCL 257.626. Defendant pleaded guilty to one count of operating a vehicle with a suspended license, MCL 257.904(1). We affirm.

This matter arises out of an automobile accident that occurred in a store parking lot when defendant crashed his van into the back of a car owned by Judith and Forrest Coons. Judith was driving; Forrest got out and approached the driver's side of defendant's van. Forrest and defendant exchanged hostile words, including Forrest's instruction to defendant to shift into park and await the police, while Judith telephoned the police. Defendant instead drove away; Forrest held onto defendant's seat belt part of the way through the parking lot but fell off. Two eyewitnesses pursued defendant's van in their own car and recorded defendant's license plate number, which they gave to the police. Police officers reported to defendant's residence, where they observed a van with the matching license plate numbers and damage consistent with the Coons's description of the accident. Defendant answered the door seemingly intoxicated and denied having consumed alcohol or driven the van that night. He was identified by four witnesses, whereupon he stated that his girlfriend's brother had driven the van that night. Defendant was transported to jail, where his blood was drawn approximately three and a half hours after the accident. His blood alcohol content was 0.17 at that time.

Relevant to the instant appeal, defendant attempted to impeach Forrest's description of what occurred immediately after the accident. In particular, defendant attempted to show that Forrest had a propensity for aggression and assaultive behavior. This would have tended to show that defendant could have had a reasonable and honest belief that it would be unsafe for him to remain at the scene of the accident, which is a defense to a charge of failing to stop at the scene

of an accident. MCL 257.618(1). Impeaching Forrest's account of the interaction could also have bolstered defendant's contention that he was sober at the time of the accident and had consumed alcohol between leaving the scene and the police officers' arrival at his house.

Forrest was a "pretty big fellow" and had been a bouncer. On direct examination, the prosecution elicited testimony from Forrest that he did not physically threaten defendant in any way, although Forrest conceded that he might come across as intimidating to someone who does not know him. On cross-examination, in response to Forrest's assertion that "I don't assault people[,]," defense counsel asked, "You weren't convicted of sexual assault?" The prosecutor objected to this question, but not before Forrest answered affirmatively. After discussing the matter with the attorneys outside the presence of the jury, the trial court instructed the jury that, for the purpose of determining whether Forrest "was being honest about whether he was assaultive or not," the jury could consider the fact that "25, 26 years ago there was some type of an assault." However, the trial court instructed the jury to totally disregard defense counsel's reference to the sexual nature of the assault.

Defendant argues that that the trial court denied him his constitutional right to a fair trial by giving the jury a limiting instruction that denigrated defense counsel, stated facts not in evidence, and offered judgments about the weight of the evidence. We disagree.

"The Sixth Amendment of the United States Constitution and article 1, § 20 of the Michigan Constitution guarantee a defendant the right to a fair and impartial trial." *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). Accordingly, "[a] trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner." *People v Waclawski*, 286 Mich App 634, 676; 780 NW2d 321 (2009). "Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence." *Id.* at 675 (citation omitted). Imperfect jury instructions that nevertheless fairly present the issues to be tried and do not impair the defendant's rights will not warrant reversal. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009).

Initially, Forrest's prior "sexual assault" was, on this record, not relevant. The point of defendant's otherwise entirely proper line of questioning was to show that, contrary to Forrest's prior testimony, he had a history of aggressive and assaultive behavior, as a layperson would understand the term. However, under MRE 609, a witness's credibility may not generally be impeached using a prior criminal sexual conduct conviction.

In light of the foregoing, we decline to consider defendant's arguments arising out of the trial court's instructions to the jury to the effect that the jury should afford minimal weight to Forrest's prior sexual assault. To the extent the trial court permitted the jury to consider the sexual assault at all, the trial court's resolution of the issue was more favorable to defendant than

he was entitled.¹ However, we will address defendant's argument that the trial court denigrated defense counsel.

Defendant argues that the trial court denigrated defense counsel by repeatedly expressing disapproval of defense counsel's question regarding Forrest's conviction of sexual assault. During his limiting instruction, the trial judge stated that he thought defense counsel's question was "improper" and "out of bounds[,]," and "probably should have been presented to me before it was asked" We do not find these remarks to have been out of line.

The trial court is required to control the trial proceedings, and it has wide but not unlimited latitude to exercise its discretion in performing that requirement. *Conley*, 270 Mich App at 307-308; MRE 611. "An accused has a right to be represented by an attorney who is treated with the consideration due an officer of the court. . . . Trial judges who berate, scold and demean a lawyer, so as to hold him up to contempt in the eyes of the jury, destroy the balance of impartiality necessary to a fair hearing." *People v Anderson*, 166 Mich App 455, 461-462; 421 NW2d 200 (1988) (citations omitted). The trial court's discretion does not permit it to be abusive. However, the trial court is also not required to be a superhuman model of meekness. Cases in which we have found impermissible denigration of defense counsel generally involve not only much harsher commentary than present here but also a repeated pattern thereof. See *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992) ("repeated rebukes and disparaging comments," including calling the defense counsel's cross-examination question "silly"); *People v Wigfall*, 160 Mich App 765, 775; 408 NW2d 551 (1987) (numerous improper remarks, including asking the defense counsel, "[d]id you go to law school and understand what a leading question is?"). The trial court here did not denigrate counsel merely by expressing its disapproval of one of defense counsel's questions in less than the blandest possible way.

Finally, even if the trial court's resolution of the issue of Forrest's prior sexual assault conviction had been erroneous, defendant would not be entitled to reversal unless it appears that any error was outcome determinative. *People v Williams*, 483 Mich 226, 243; 769 NW2d 605 (2009). That is, any such error must have undermined the verdict, and we analyze that question in light of the strength and weight of the untainted evidence. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). Defendant regards Forrest's testimony as of great importance. However, the prosecution presented ample evidence of defendant's guilt other than Forrest's testimony.

Two eyewitnesses testified that defendant acted intoxicated at the time of the accident. The police arrested defendant approximately 45 minutes after the accident, and his subsequent blood test revealed a blood alcohol content of 0.17, more than twice the statutory limit for operating a vehicle. MCR 257.625(1)(b). Both of the arresting officers testified that defendant appeared intoxicated at the time of his arrest. Moreover, the officers indicated that they did not

¹ We do not express any view whether a prior sexual assault would be relevant in any other case or context, and we do not express any view whether any other kind of prior assault would have been relevant here. Our decision is strictly limited to this case and the facts available to us from this record.

see any debris from recent alcohol consumption in defendant's home. Two eyewitnesses who observed defendant's interaction with Forrest and who pursued defendant's vehicle testified that he believed defendant to have been intoxicated at the time, and they also confirmed Forrest's account of his interaction with defendant. Defendant initially denied driving the van, and he attempted to pass blame to someone else when he was identified. He admitted that he drove with a suspended license. Even without Forrest's testimony, there was overwhelming evidence that defendant drove while intoxicated and strong evidence that he left the scene to avoid legal consequences. Accordingly, any error was harmless.

Affirmed.

/s/ Jane M. Beckering

/s/ Donald S. Owens

/s/ Amy Ronayne Krause